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Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 661.

WHITAKER WRIGHT, APPELLANT,

vs.

WILLIAM HENKEL, UNITED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF NEW YORK, ET AL., APPELLEES.

APPELLANT'S BRIEF IN REPLY TO THE SOLICITOR GENERAL.

In view of the intervention of the United States and the brief filed in its behalf by leave of the court, the following additional suggestions are with the permission of the court respectfully submitted on behalf of the appellant:

I.

The questions arising under the warrant of March 16 are identical with those that can arise under that of March 31, so far as they are reviewable here, and therefore should now be passed upon.

We agree with the Solicitor General that the ultimate question to be decided here is that of extraditability. However great the mass of evidence that may be presented on

the subject of criminality, this court will not review the weight of evidence, but it will determine whether or not the case comes within the terms of the treaty.

That proposition is presented by the record now before the court, as effectually as though the complaint and warrant were replete with evidentiary allegations. They charge the appellant with the crime of "fraud as a director," in the language of the English statute, and we have not criticised and do not contest the sufficiency of the allegation. We treat it as being ample as a pleading, but say that conceding that in proper legal form it accuses the appellant of a violation of section 84 of 24 and 25 Victoria, chapter 96, there can nevertheless be no extradition for that offense, because it is not, in the language of the treaty, "made criminal by the laws of both countries."

A comparison of the complaint and warrant of March 16 with that of March 31 will show that, so far as form of allegation is concerned, they are modeled on identical lines—one is no better and no worse than the other. So far as substance is concerned, they both charge the appellant with an offense under section 84 in the language of the section, viz., that, being a director of the London and Globe Finance Corporation, he unlawfully made, circulated, and published certain reports and statement of accounts of the corporation which were false, and which he then knew to be false, with intent thereby to deceive and defraud shareholders or members of the corporation, etc. The slight amplification of this language in the complaint and warrant of March 31 does not in any material respect change the nature or effect of the accusation. It describes an offense under section 84 and nothing else.

This offense is either extraditable or it is not. Whether or not it is, can be determined upon the present record as effectually as upon one containing the warrant of March 31.

In the recent case of *Greene and Gaynor*, reported in *Montreal Gazette of August 16, 1902*, to be found in the files of the Department of Justice, the right of extradition on a charge of "conspiracy to defraud" was presented on a writ of *habeas corpus* issued immediately on the arrest of the prisoners on a provisional complaint and warrant.

In addition to charging the offense described in section 84, the complaint and warrant of March 31 also charge the appellant with falsifying books, papers, and writings belonging to the company and with making and concurring in the making of false entries, etc., with intent to defraud, etc. This describes the offense defined by section 83 of the English statute. We claim that it does not create an extraditable crime; but even if did, the fact that two crimes are charged against the appellant should not deprive him of this opportunity of having it determined that he cannot be extradited for one of those crimes, viz., that defined by section 84, and of the privilege of insisting that even should he be extraditable for the other of those crimes, viz., a violation of section 83, that if surrendered for that crime he cannot be tried on the charge of violating section 84. Although it has been stated that the demanding government has presented to the commissioner substantially all of its testimony in support of the complaint of March 31, the appellant, if put to his proof, will find it necessary to bring witnesses from England, and in view of the fact that Judge Lacombe's decision now sought to be reviewed, until reversed, will natu-

rally be followed by any court to which the appellant may apply for the purpose of testing the extraditability of the offenses charged in the warrant of March 31, and the early adjournment of this court will render a hearing before this tribunal impossible before next October, the appellant would be forced to remain imprisoned until then, unless relief can be afforded to him on this appeal.

II.

The crime charged against the appellant does not come within the terms of subdivision 3 of section 611 of the New York Penal Code, and therefore no case for extradition is established even under the appellees' interpretation of the treaty.

The Solicitor General claims that section 84 and the section of the New York Penal Code quoted on page 11 of his brief together make out a case of a "fraud by a director made criminal by the law of both countries," and his argument is addressed to the proposition that nothing more is necessary than that the crime shall be against the laws of the demanding government and against those of the State where the accused is apprehended. He, however, of necessity concedes that the offense charged must at all events be a crime against the laws of that State. He could not well do otherwise.

In re Frank, 107 Fed. Rep., 272.

It is inconceivable that there may be any arrest for a crime within the boundaries of any State or Territory whose particular jurisprudence does not make the act charged

criminal. Hence the least that can be required in any case is that the offense charged shall be made criminal in the jurisdiction where the arrest takes place. This is the very basis of the appellees' contention.

The Solicitor General has not answered our contention that the provision of the New York Penal Code on which he relies does not define a crime which can be described as "the fraud of a director" or any equivalent crime.

(a.) The offense which it creates contains no element of fraud. The English statute makes "fraud" the *sine qua non.*

(b.) It does not require "the intent to deceive and defraud" (*Gardner vs. People, 62 N. Y., 299*). The English crime depends upon the "fraudulent" intent.

(c.) It does not require *scienter* of the falsity of the report on the part of the accused. The English statute makes it essential. The word "knowingly" as used in the New York statute has reference only to concurrence in the making or publishing of the report, and not to knowledge of the falsity of its statements. The English statute uses the phrase "which he shall know to be false."

(d.) It creates an offense of a venial nature and punishes carelessness and inconsiderateness amounting to official misconduct but not to fraud.

An indictment in England charging an offense in the language of the New York Penal Code would be bad. One indicted in New York for the statutory offense in the terms of the code would not be extraditable from England.

Proof in England of the elements of the New York crime would not suffice to make out a case under the English statute. How, then, can it be said that the act of which the appellant is accused "is made criminal by the laws of both countries"?

III.

The appellees fail to give due effect to the qualifying phrase of the treaty upon which we rely, but treat it as surplusage.

The concession of the Solicitor General that in every case under the treaty the offense charged must be a crime under the law of the demanding country and of the State where the arrest occurs establishes as an inevitable carollary the proposition that the words "made criminal by the laws of both countries" have a wider significance than he has given to them, since otherwise they are meaningless. If every crime must be "made criminal by the law of both countries," then why was it necessary in three of the subdivisions of the treaty of 1889 to repeat that phrase, and why was it omitted in the remaining seven subdivisions? The high contracting parties are not to be presumed to have indulged in pleonasm, or to have chosen their language without the deliberation which the very conception of an international treaty implies. On the contrary, they must be considered to have weighed their words. If, therefore, the crimes enumerated in the treaty of 1842 and in the seven subdivisions of the treaty of 1889, which omit the phrase "made criminal by the laws of both countries," where Great Britain is the demanding government, in order

to be extraditable must be criminal by its laws and by those of the State where the prisoner is apprehended, in the three instances where that phrase is employed to qualify the description of the crime, something more is intended than that the act should be made criminal by the laws of the State where the prisoner is found.

We contend that it must be criminal either at common law, or by act of Congress, or, at least, by the general trend and clear preponderance of the legislation of the several States. None of these conditions exist.

This court takes judicial notice of the laws of the several States. Those applicable here have been collated for its convenience in the Appendix to our main brief. The correctness of the digest has not been assailed.

IV.

The absence of congressional legislation creating the crime charged against the appellant is deserving of further emphasis.

It has been shown that it is within the purview of Federal legislation to deal at least with corporations engaged in interstate traffic and with such as are instrumentalities of the Government, and to require of them the making of reports, which if fraudulent and false may be made the basis of a criminal prosecution. It has likewise been pointed out that there has been no such legislation. In the case of national banks, section 5209 of the United States Revised Statutes has been referred to in the appellees' brief, but not in the oral argument. But, for the reasons shown on pages 24–27

of our main brief, it has no application. At most it indicates that so far as there may be an English statute of similar tenor applicable to banks of the same general character, there is one class of fraud of a director when committed with respect to a corporation arising within the description of the national banking act, which is "made criminal by the laws of both countries." The failure to make further provision is significant. The importance attached to national banks may have been the occasion of inserting in the treaty these qualifying words.

The appellees have in their brief referred to section 166 of the English Companies act. That section has no application to the crime charged in the present record. It relates to falsification of books and false and fraudulent entries made with intent to defraud by a director of a company *wound up under that act.* That statute contains provisions for the voluntary and involuntary winding up of corporations. Our bankruptcy act applies to the winding up by involuntary proceedings of practically all corporations other than banks, and has defined a series of crimes which may be committed with respect to the affairs of a bankrupt; yet the crime described in section 166 is not made criminal by Congress. The power existed, but was not exercised. Congress acted advisedly when it failed to make the act criminal by the laws of the country.

V.

The question of bail.

1. It is claimed by the appellees that sections 1014 and 1015 of the United States Revised Statutes must be read together. If read together they indicate the policy of our

Government on the subject of bail; but we do not believe that they must be so read. Section 1014 declares that "for *any* crime or offense against the United States the offender may, by any justice or judge, etc. * * * be arrested and imprisoned, or bailed as the case may be before such court of the United States as has cognizance of the offense." The subject of bail is thus provided for.

Then follows section 1015, which announces that "bail shall be admitted upon *all* arrests in criminal cases where the offense is not punishable by death, and in such cases it *may* be taken by any of the persons authorized by the preceding section (§ 1014) to arrest and imprison offenders. The reference to the preceding section is for the sole purpose of specifying the judicial officers who may act. In the preceding section they had already been authorized to take bail for "any crime or offense against the United States." Why, then, repeat the provision as to bail, unless it was to have reference to any case of arrest in criminal cases in which the process of the United States was employed, as in the cases of extradition or deportation.

2. In the case of Queen *vs.* Spillsbury the crime was committed in the waters of Morocco, an independent government. It is true that the arrest was under the fugitive offenders' act, but the proceeding was practically one of extradition. The language of Mr. Justice Wright which the Solicitor General quotes is merely to the effect that cases arising under that act will not "in all instances" apply as precedents in cases under the extradition acts. That must obviously be due to the fact that extradition treaties some-

times contain provisions differing from those of the fugitive offenders' act.

3. If, as is claimed by the Solicitor General, the law of the State where the accused is apprehended applies not only with respect to the substantive law, but certainly as to procedure, then, since the right to bail is recognized by the New York Code of Criminal Procedure, it must exist in a case of this character.

4. The argument that the contract embodied in the treaty requires our Government to hold one arrested at the instance of the British government without bail is without foundation. The treaty does not so stipulate; neither do considerations of comity. In the past the British government has not in all instances found itself constrained by even the letter of the treaty, and has in many instances given to it a strict interpretation against our Government. We owe no greater obligation of diligence with respect to the custody of offenders against its law than we do against those violating our own.

Respectfully submitted.

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